

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT

CHAMPAIGN COUNTY, ILLINOIS

JOHN C. BAMBENEK,

Plaintiff,

V.

Case No. 2019 - MR -

BOARD OF TRUSTEES OF THE
UNIVERSITY OF ILLINOIS,

Defendant.

VERIFIED COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

NOW COMES the Plaintiff, JOHN C. BAMBENEK, *pro se*, and pursuant to 5 ILCS 140/11 respectively moves this Court for declaratory and injunctive relief in the withholding of public documents lawfully requested from the Defendant.

INTRODUCTION

1. Plaintiff complains of a denial of a Freedom of Information Act request of documents that are, in fact, public records and required to be disclosed. Plaintiff further complains such denial by the Defendant was not made in good faith and represents a pattern of activity to thwart the public's right to know the activities of a public body generally and specifically in the matter of the faculty-staff sexual misconduct epidemic on the Urbana-Champaign campus.

2. Recent news has shown the University of Illinois is hardly unique in facing the consequences of, at best, chronic inaction or, at worst, intentional ignorance in regard to sexual harassment and predation. Jeffrey Epstein, Harvey Weinstein, Richard Strauss, Larry Nasser, and a list of men too long to list here have benefitted from an institutional privilege usually afforded to rich and old white men that provided them the secrecy they needed to perpetuate their predation. This secrecy is an essential ingredient in the culture of sexual harassment and assault gripping this community and the nation.

3. This present action to enforce the public's right to know what their government is doing to isn't merely an exercise in transparency; it is an attempt to right decades of denials, cover ups, and confidentiality agreements that preserve the ability of those in power to sexually harass, molest, and assault those who are not.

PARTIES

4. Plaintiff John C. Bambenek is a resident of Champaign County, formerly a member of the Illinois Board of Higher Education, and a graduate student at the University of Illinois at Urbana-Champaign. Additionally, he is a recognized expert in digital forensics and computer crime investigation and has served in expert witness capacities regarding digital evidence.

5. Defendant University of Illinois is a public University in the State of Illinois comprising of three campuses. The public records involved are most likely in Champaign County, Illinois. The Board of Trustees of the University of Illinois is the governing body of the agency.

6. Thomas Hardy is the Chief Records Officer of the University of Illinois. He was the recipient of the Freedom of Information Act (FOIA) request and responded on behalf of the University of Illinois when those records were denied. His principal office is in Urbana, Illinois.

JURISDICTION AND VENUE

7. The Illinois Freedom of Information Act is codified under 5 ILCS 140. When public records are denied, judicial review is authorized by 5 ILCS 140/11(a) which specifies the circuit court as having authority and jurisdiction to adjudicate denials.

8. As both the principal office where the request was denied and the Plaintiff are in Champaign County, Illinois, pursuant to 5 ILCS 140/11(b), the Circuit Court of Champaign County is the appropriate venue for this present action.

BACKGROUND

9. The Defendant has a long history of being less than forthcoming with FOIA requests. As an example, below represent some public reporting of FOIA denials from the media:

a. "UI system repeatedly denies Daily Illini FOIA requests", Jessica Bursztynsky of the Daily Illini, Dec 3, 2018.

b. "Analysis: Illinois Law Hasn't Stopped Public Agencies from Withholding Records", Annum Haider of the Better Government Association (blog), January 10, 2019 (according the Public Access Counselor, University of Illinois improperly claimed exemptions 63% of the time).

c. "If Everyone Does it...", Carl Straumsheim of Insider Higher Ed, August 11, 2015.

d. "UI police officer once again subject of sexual-harassment complaints", Julie Wurth of the News-Gazette, July 14, 2019 (section "AG sides with newspaper").

10. In the present matter, the subject matter of the FOIA request (Exhibit B) is the ongoing epidemic of faculty-staff sexual harassment and, in some cases, groping, of students and other staff at the University of Illinois.

11. There has been a great deal of media reporting by ProPublica and the Next-Gazette, but in recent years the following are the sexual harassment investigations that are public and known to the Plaintiff:

- a. Professor Valarmathi Thiruvanamalai
- b. Professor Jay Kesan
- c. Clinical Professor Joe Petry

- d. Professor Amita Sinha
- e. Professor Mahir Saul
- f. Professor Gary Xu
- g. Department administrator (and lecturer) Lee Waldrop
- h. Professor Jay Rosenstein
- i. Police Officer Brian Tison

12. In many of the above cases, the University took steps to conceal the misconduct by dropping investigations in lieu of resignation and/or signing confidentiality agreements. ("One Campus. Seven Professors Facing Harassment Accusations. Few Consequences" by Rachel Otwell and Alex Mierjeski of NPR Illinois and ProPublica, August 27, 2019).

13. In one case, an investigation had to be re-opened after the professor was allowed to retire as new victims came forward ("UI professor under investigation says he'll leave job at end of May", by Julie Wurth of the News-Gazette, April 26, 2019).

14. The past conduct of the University in regards to FOIA and improper use of exemptions combined with the pattern of behavior of trying to manage sexual harassment and groping complaints as potential public relations problems that need to be concealed from public view (compared to treating them as violations of the rights of the women involved who need to be

protected from harm) paints the picture of an institution desperate to use any means, including spurious ones, to prevent the public from having access to documents and information they are entitled to.

FACTS

1. In December 2018, Plaintiff requested and received all final reports for sexual harassment investigations involving faculty or staff for calendar year 2017. The Defendant fulfilled that request with 3 reports sent as part of that response (Kesan, Sinha, and Waldrep).

2. On January 22, 2019, Plaintiff filed a FOIA request for all final reports of sexual harassment investigations from January 1, 2016 to December 31, 2016. This request was filed as a member of the Illinois Board of Higher Education. This FOIA request number is 19-065 in the Defendant's filing system. This request is not part of the present complaint but referenced here to help show a pattern of behavior.

3. On or about February 4, 2019, a representative of the University contacted the Plaintiff by phone asked for a length extension, not longer than April 1, 2019, so they could produce all documents responsive to this request from 2014 onward. Despite this being well outside the statutory timeframe, Plaintiff approved this accommodation. This call was not

recorded, and Plaintiff is relying on his recollection for the substance of this call.

4. On March 1, 2019, the Defendant summarily denied the FOIA request for the original documents sought concerning calendar year 2016. The reason for this denial was 5 ILCS 140/7(1)(n). A true copy of this denial letter is attached as Exhibit A. The letter specifically said the exemption they were using "shall not extend to the final outcome of cases in which discipline is imposed", which was exactly the documents requested by the Plaintiff. They did not say there were no such documents.

5. This denial, again, was well outside the statutory time limits and ran counter to the reasons Plaintiff allowed such a lengthy delay in the first place.

6. On July 19, 2019, Plaintiff filed another FOIA request (Exhibit B), this time for all final reports from January 1, 2014 to June 30, 2019. This FOIA request was numbered 19-616 in the Defendant's filing system and is the subject of this present action.

7. This request was denied on July 25, 2019, without the customary request for the extension allowed in law. This denial was for 5 ILCS140/3(g) as unduly burdensome. Plaintiff was "invited" to refile his request for no longer than 1 year durations for 2016 onward, and no longer than 6 month durations

for prior to 2016. The only justification was given for the difference because the relevant University department "updated its database in 2016". This denial is attached as Exhibit C.

COUNT I - BAD FAITH DENIAL OF FOIA REQUEST

8. FOIA request 19-616 was denied as "unduly burdensome" but the law does not give *carte blanche* to a public body to use that exemption as the see fit. There are specific requirements for its use. From 5 ILCS 140/3(b):

"If any public body responds to a categorical request by stating that compliance would unduly burden its operation and the conditions described above are met, it shall do so in writing, specifying the reasons why it would be unduly burdensome and the extent to which compliance will so burden the operations of the public body. Such a response shall be treated as a denial of the request for information."

9. Defendant asserts that it is unduly burdensome solely because they updated a database the request would be burdensome. They offer that requests for 2016 data forward be filed in 1 year increments and prior to 2016 in 6 month increments. These artificial duration restrictions are arbitrary and capricious.

10. It would be easy, at first blush, to see this as a reasonable request, however, 5 ILCS 140/2(g) defines recurrent requestor and 5 ILCS 140/3.2 specifies the ability of a public

body to diminish the importance and priority of such requests. To comply with their request would require filing 7 different FOIA requests. In reality, all could be submitted simultaneously and obligate the University to respond to them all under the same statutory time frame anyway. The Defendant's request for an accommodation was a mere invitation to invite the Plaintiff to allow himself to be labelled a "recurrent requestor" so his requests would be legally diminished.

11. The history of the Defendant with this Plaintiff in regard to FOIA also cannot be ignored. In FOIA request 19-065, Defendant requested additional time and it was granted. They responded by denying the one-year request for data anyway. In 19-065, the request already followed their recommendations in 19-616 but was nonetheless denied. Plaintiff has granted accommodations in the past under the promise that additional time would help compliance, that accommodation and agreement was not honored.

12. While the Defendant may have updated their database system in 2016 which requires pre-2016 data to be searched "manually", 2016 reports forward require no such manual search per their letter. It is unclear as to what purpose requesting post-2016 data in 1-year windows would then accomplish. If the data is all electronic and queryable from 2016 onward, presumably they could simply produce them all with the same

query complexity as a 1-year window of data. They provide no rationale at all as to why longer durations of data are unduly burdensome for after-2016 reports. For instance, and by way of comparison, the following is pseudocode for a search query for one year of data and one for 2.5 years of data:

a. SELECT * WHERE ACCUSED="faculty" AND FINDING=TRUE AND
DATE<="2016-01-01" AND DATE >="2016-12-31"

b. SELECT * WHERE ACCUSED="faculty" AND FINDING=TRUE AND
DATE<="2016-01-01" AND DATE >="2019-06-30"

13. The above is an example, Plaintiff doesn't know details of the database the Defendant is referring to. However, the Plaintiff does know how databases work and the complexity of a one-year window of documents and a 2.5 year window is literally identical. Further, in Plaintiff's FOIA Request 19-065 did exactly with the Defendant requested, asking for only a one-year window and they still denied the request. It should not be lost on this Court that the Defendant's request to narrow was explicitly also denied just a few short months ago.

14. For pre-2016 data, Defendant recommends 6-month rolling durations for requests. Mathematically this means that searching through that data takes twice the effort as a simple query that their new database can do. The math suggests that this isn't unduly burdensome either.

15. However, and most damning of all, under the intense national media scrutiny and campus outcry, it defies credulity that the Defendant doesn't already know which faculty and staff were involved in complaints. Committees have been formed to study the problem. What, precisely, could those committees be doing if they aren't looking at the source documents that lay out the problem in detail? The Board of Trustees has expressed public concern about the problem. Campus administrators have repeatedly been asked about this by the media. In the approximately two years this controversy has gone on under intense media and public scrutiny, it simply is not plausible that no one working in leadership in the Defendant organization has asked "how many are there that have done this?". The Defendant either knows who the accused are or they are explicitly choosing not to know. If the latter, Plaintiff also argues that intentional and decided negligence does not raise to the high bar of "unduly burdensome" either.

16. Plaintiff intends to prove in discovery that the specific cases are already known to the Defendant and their denial for the unduly burdensome nature of searching for the documents is a thinly veiled manner in which their intent to deny the public visibility to the scope of the problem is in search of an exemption for which to justify the cover up.

17. Worse yet, many of these documents have already been produced. This plaintiff has 3 of the reports from 2017. ProPublica has 4 additional reports. The News-Gazette has 1 more beyond that. The Defendant doesn't need to process these requests *de novo*. Many of these documents have already been reviewed and released. In the case of those documents, they simply need to find a prior released report and deliver that. A task that from initiation to completion should take moments, at best.

18. There is no way, absent discovery, to know specifically how many sexual harassment and abuse allegations have been filed against faculty or staff of the University. However, taken the assumption that 3 responsive reports a year (from 2017) is indicative of the approximate volume, that would mean there could be 16 to 17 reports responsive for the time period requested in FOIA request 19-616.

19. As an important note, the Defendant did not claim that redacting the reports would be unduly burdensome, they only mention that the search would be burdensome. Even so, a review of 16 to 17 reports, even if conducted *de novo*, would not be burdensome in the general case. Especially in the case of protecting students against faculty and staff who would prey on them, the public need for such visibility far outweighs many other considerations. That said, many of these reports have

already been reviewed and released, there need not be multiple reviews of the same document requested by additional parties as it served no legal or practical purpose.

20. Further, the threshold for "unduly burdensome" is not simply a matter of what is easier to manage or preferential for the FOIA officer to handle. The statute sets a threshold which is "burden the operations of the public body". This statutory limitation makes sense, no public body should be waylaid from the act of governing to become a public records production mill. That being said, the exemptions from disclosure are to be narrowly construed (*Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997)).

21. That said, the Defendant has an entire department dedicated to the task of public records production. According to the Defendant's website, the University administration's public relations department employs 7 people. A small public body with 4 people in total has to worry about taking staff away from everyday work to respond to FOIA requests. The University of Illinois has over 13,000 employees on the Urbana campus alone, the overwhelming majority of whom are entirely oblivious of such requests. A request needs to be more institutionally impactful than just the needs of one office that exists almost exclusively for the purposes of fulfilling FOIA requests.

22. Further, on good-faith and anecdotal information, Plaintiff believes Defendant has different teams that handle student-to-student sexual harassment complaints and ones that handle faculty-staff ones. Presumably those investigators in the latter group could tell you which faculty-staff were the subject of credible complaints purely from memory without having to resort to a database especially considering the reports requested are from 2014 onward. The Plaintiff will attempt to prove this in discovery.

23. Lastly, the absence of a database does not mean such documents are unsearchable. There are a wide variety of techniques to search text records for appropriate text. Techniques to do that are taught on this very campus. Unless documents about these complaints prior to 2016 exist on paper only, a possibility that is so absurd it need not be considered, these documents are available in electronic form and can be searched via electronic means. The specifics of how these documents are stored and can be searched will be explored in discovery. Even if stored on paper, they can be scanned using optical character recognition (OCR) so they can become searchable via electronic means. Regardless, some of these documents have already been produced in other requests by others, so most are already electronic, are already known by the Defendant, and have already been appropriately redacted.

24. In a recent case decided by the Public Access Counselor, the Governor's office suggested searching more than 1,700 emails was unduly burdensome (*Public Access Opinion 18-013*). The Public Access Counselor rejected this argument. In the present case, either the number of documents is much smaller than 1,700 or the scope of the sexual harassment and abuse problem at the Urbana-Champaign campus is radically worse than anyone could have imagined.

25. Plaintiff, having read several of these reports that are public, attests that these reports all have summaries at the beginning of the document. Typically, the first or second sentence would describe the role of the accused. Within the first few paragraphs there would be a summary of the investigation. This means even if there were thousands of reports to look through, in most cases, only the first paragraph would need to be reviewed to determine if the document was responsive (albeit further reviews for redactions may be needed).

26. As the Defendant did not specify how many reports there were, there is no way to know at this stage exactly how time consuming this would be. Plaintiff intends to identify specifically how many responsive documents there could have been in the process of discovery so this Court has specific numbers

with which to evaluate the Defendant's claim that identifying those documents alone would be "unduly burdensome".

27. The primary purpose of the public body operated by the Defendant is teaching and research. There is no plausible way to envision any set of circumstances in which a FOIA request would somehow impact professors trying to teach their students when such requests are handled by the "back office" well outside the view of those performing the work of the public body.

28. Further, the statute states the public body must specify the reasons why a request is burdensome and how that request will unduly burden the public body. This allows for informed understanding between public body and the public so reasonable people can come to some understanding.

29. In the present case, all Plaintiff has to go on is that the Defendant got a new database and pre-2016 data might need to be searched manually (despite the investigators who did the reports likely still being on staff and able to tell you exactly what documents are responsive). The Defendant didn't explain how it come up with the 1-year duration and 6-month duration windows, how many documents had to be searched, or anything that could be understood as to how it would impact the work of the public body.

30. Lastly, any request for denying a FOIA request as unduly burdensome must be weighed against the public interest in

disclosure of requested documents (*National Ass'n of Criminal Defense Lawyers v. Chicago Policy Dep't*, 399 Ill. App. 3d 1, 15 (1st Dist. 2010)). The documents requested are a relatively narrow timeframe involving faculty-staff sexual abuse and assault allegations against faculty where there was a finding of fault. It is hard to argue that the campus community is not served by knowing the identities of potential sexual predators before registering for a class that creates the very power dynamic that allows such predators to assault, abuse, and harass students and junior faculty.

31. In short, the Plaintiff has to merely trust the University that the request is unduly burdensome based on no real information at all. However, the history of the Defendant's handling of FOIA requests from this specific Plaintiff and the behavior of the Defendant in regard to FOIA requests generally suggest that such trust would be entirely misplaced. Plaintiff intends to prove this in discovery.

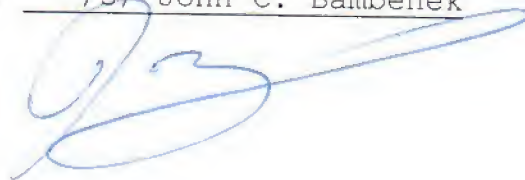
32. Plaintiff alleges and, presumably, Defendant agrees (based on the FOIA denial letter for 19-616) such documents are public records and should be released (potentially with redaction). Plaintiff further alleges the 19-616 denial was in bad faith and part of an institutional design to thwart FOIA requests generally and hide information about faculty-staff misconduct specifically.

33. Statute allows under 5 ILCS 140/11(j) for a civil judgment of not less than \$2,500 and no more than \$5,000 against a public body for willful and intentional failure to comply with the statute which is specifically being alleged here.

WHEREFORE, Plaintiff JOHN C. BAMBENEK, pray this court enter judgment against Defendant, the UNIVERSITY OF ILLINOIS, declaring that their denial of FOIA request 19-616 runs contrary to law, the such denial is in bad faith and represents an intentional and willful failure to follow 5 ILCS 140, to enjoin the Defendant from concealing the reports requested, to assess a civil fine against the Defendant pursuant to the terms of 5 ILCS 140, to order the Defendant to pay any relevant fees and costs of the Plaintiff's for pursuing this action, and for any other relief as is just and proper.

JOHN C. BAMBENEK, Plaintiff

BY: /s/ John C. Bambenek



VERIFICATION BY CERTIFICATION

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in the above and foregoing Complaint are true and correct, except as to matters therein stated to be on information and belief, and as to such matters the undersigned certifies as aforesaid that she verily believes the same to be true.

DATED: 9/23/19

A handwritten signature in blue ink, appearing to read "John C. Bambenek", is written over a horizontal line.

JOHN C. BAMBENEK
Plaintiff

EXHIBIT A

March 1, 2019

Via electronic mail
John Bambenek
Bambenek@ibhe.org

Re: FOIA Request 19-065

Dear Mr. Bambenek:

I am responding to your request dated January 22, 2019, under the Illinois Freedom of Information Act (FOIA) in which you requested:

"The following documents are requested from January 1, 2016 to December 31, 2016:

* Copies of any and all final reports for any sexual harassment investigation where there was a finding of a violation of any sexual harassment policy or any other policy including but not limited to codes of conduct, other policies of the University, other policies of individual campuses, or potential violations of state or federal law or regulation.

* This request applies to the University of Illinois at Urbana-Champaign only.

* This request applies to ODEA.

* The above documents MAY be redacted to remove identifying information of the accused or accuser in the interest of protecting privacy, but the rest of the documents including specifics of the complaints should be produced."

Please note that after a search conducted by the Office of Diversity, Equity and Access and review of all responsive reports by this office, your request is denied pursuant to the following section(s) of the Act:

- 140/7(1)(n) Records relating to a public body's adjudication of employee grievances or disciplinary cases; however, this exemption shall not extend to the final outcome of cases in which discipline is imposed.

You have a right, under the law, to seek a review of this response by the Public Access Counselor (PAC) in the Office of the Attorney General. The PAC may be reached by phone at 877-299-3642, by email to publicaccess@atg.state.il.us, or by postal mail at the Public Access Bureau, 500 S. 2nd Street, Springfield, Illinois 62706. You also have the right to seek judicial review under section 11 of this Act.

If you have questions for our office, please contact 217-333-6400.

Sincerely,

Thomas P. Hardy
Executive Director
and Chief Records Officer

EXHIBIT B

(original FOIA request)

July 19, 2019

The following is a request under the Illinois Freedom of Information Act. As disclosure is in the public interest and the request is not commercial, a fee waiver is requested. Electronic delivery is preferred. If fees will be charged in excess of \$10, please contact me before production to discuss.

The following documents are requested from January 1, 2014 to June 30, 2019:

- * Copies of any and all **final** reports for any sexual harassment investigation where there was a finding of a violation of any sexual harassment policy or any other policy including but not limited to codes of conduct, other policies of the University, or potential violations of state or federal law or regulation. This includes both the final report and any communication with the relevant supervisor, department head, etc. on the disposition of the complaint and recommendations made.
- * Note the above is for FINAL reports and communications regarding complaints.
- * This request applies to the University of Illinois at Urbana-Champaign only.

* This request applies to ODEA and/or any successor organization investigated sexual harassment/Title IX complaints.

* The above documents MAY be redacted to remove identifying information of the accused or accuser in the interest of protecting privacy, but the rest of the documents including specifics of the complaints should be produced."

In June of this year, the attorney general for the state of Illinois ruled in a FOIA appeal such documents are public records and required to be produced, so production in this case is expected. If you have questions regarding this request, you can email me or contact me at 217-493-0760.

EXHIBIT C

(FOIA Response from Defendant)

July 25, 2019

Via electronic mail
Mr. John Bambenek
john@johnbambenek.com

Re: FOIA Request 19-616

Dear Mr. Bambenek:

I write to respond to your Freedom of Information Act (FOIA) request dated and received in my office on July 19, 2019, in which you requested the below information:

* Copies of any and all **final** reports for any sexual harassment investigation where there was a finding of a violation of any sexual harassment policy or any other policy including but not limited to codes of conduct, other policies of the University, or potential violations of state or federal law or regulation. This includes both the final report and any communication with the relevant supervisor, department head, etc. on the disposition of the complaint and recommendations made.

* Note the above is for FINAL reports and communications regarding complaints.

* This request applies to the University of Illinois at Urbana-Champaign only.

This request applies to ODEA and/or any successor organization investigated sexual harassment/Title IX complaints

Please note that the Office of Diversity of Equity and Access updated its database in 2016. All reports generated prior to 2016 must be searched for manually to determine if there was a violation. As a result, your request for documents is unduly burdensome to the University (5 ILCS 140/3(g)). Pursuant to Section 3(g) of the Act, we would like to extend to you an opportunity to make it of more manageable. Please modify your request by narrowing the timeframe to one year for any post-2016 reports and six months for any pre-2016 reports.

You have a right, under the law, to seek a review of this response by the Public Access Counselor (PAC) in the Office of the Attorney General. The PAC may be reached by phone at 877-299-3642, by email to publicaccess@atg.state.il.us, or by postal mail at the Public Access Bureau, 500 S. 2nd Street, Springfield, Illinois 62706. You also have the right to seek judicial review under section 11 of this Act.

If you have any questions, or would like to discuss how to narrow the scope of your request, please contact me at 217-333-6400.

Sincerely,

Thomas P. Hardy

Executive Director

and Chief Records Officer